

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

Sylvester Littlewind,)	
)	
Petitioner,)	Criminal No. 2:07-cr-116
)	Civil No. 2:10-cv-63
-vs-)	
)	ORDER ADOPTING REPORT AND
United States of America,)	RECOMMENDATION
)	
Respondent.)	

The undersigned judge referred to the magistrate judge for preparation of a Report and Recommendation Petitioner Sylvester Littlewind's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. #132) and Motion to Proceed *In Forma Pauperis* (Doc. #133). The Court has received a Report and Recommendation from the Honorable Karen K. Klein, United States Magistrate Judge, pursuant to 28 U.S.C. § 636, recommending that Littlewind's motions be denied.

On February 7, 2011, Littlewind filed objections to the Report and Recommendation (Doc. #139). In his objections, Littlewind requests counsel be appointed to represent him on his petition and an evidentiary hearing be held. A petitioner is entitled to an evidentiary hearing on his § 2255 petition unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Watson v. United States, 493 F.3d 960, 963 (8th Cir. 2007) (quoting 28 U.S.C. § 2255(b)). A district court does not err in dismissing a petitioner's motion under § 2255 without a hearing if: (1) the petitioner's allegations, accepted as true, would not entitle him to relief; or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.

Buster v. United States, 447 F.3d 1130, 1132 (8th Cir. 2006). The facts and issues presented by Littlewind do not support a cognizable claim for relief; therefore, the request for an evidentiary hearing is denied.

“Where an evidentiary hearing is not required, the district court retains discretion to determine whether counsel should be appointed.” United States v. Degand, 614 F.2d 176, 179 (8th Cir. 1980). In reviewing the petition, it is clear Littlewind adequately raised the issues he wants the Court to address and the appointment of counsel is unnecessary. Further, the record conclusively demonstrates that Littlewind is entitled to no relief; therefore, the request for the appointment of counsel is denied.

After a careful review of the magistrate judge’s Report and Recommendation, Littlewind’s objections, and the entire record, the Court finds Littlewind has failed to raise a cognizable claim for relief. Accordingly, the Court hereby adopts the Report and Recommendation in its entirety. For the reasons set forth therein and in this Order, Littlewind’s Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 is **DENIED**. Additionally, Littlewind’s Motion to Proceed *In Forma Pauperis* is **DENIED** as there are no filing fees or costs associated with filing a § 2255 petition. This action is hereby **DISMISSED** with prejudice.

CERTIFICATE OF APPEALABILITY

The Court certifies that an appeal from the dismissal of this action may not be taken *in forma pauperis* because such an appeal would be frivolous and cannot be taken in good faith. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962). Furthermore, the Court finds that Littlewind has failed to make a substantial showing of the denial of a constitutional right, and the

issues presented in this case are inadequate to deserve further consideration. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Therefore, the Court will not issue a certificate of appealability.

If Littlewind desires further review of his Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, he may request the issuance of a certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with Tiedeman v. Benson, 122 F.3d 518, 520-22 (8th Cir. 1997).

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 11th day of February, 2011.

/s/ Ralph R. Erickson

Ralph R. Erickson, Chief Judge
United States District Court